NO. 82-1861

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

V. LOUISE McCARREN, *et al.*,

Petitioners,

v.

TOWN OF SPRINGFIELD, VERMONT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

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QUESTION PRESENTED

Whether, where a proposed hydroelectric project on waters under the jurisdiction of the United States is required to be licensed by the Federal Energy Regulatory Commission under the Federal Power Act, a state administrative agency, consistently with *First Iowa Hydro-Electric Coop.* v. *F.P.C.*, 328 U.S. 152, may lawfully forbid construction of the project unless the applicant for the federal license also secures a certificate permitting construction of the project from such agency under state law?

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STATEMENT OF CASE

The Town of Springfield, Vermont applied in 1978 to the Federal Energy Regulatory Commission under the Federal Power Act for a license to construct a hydroelectric project on the Black River.[1] It is undisputed that the waters involved are under the jurisdiction of the United States (Pet. 3) and that the FERC has and is exercising jurisdiction over the proposed project (Pet. 58a).

[1] Springfield obtained a preliminary permit for the project in 1976 and Springfield and the Vermont Public Power Supply Authority petitioned in 1981 to amend the application to join the latter as an applicant.

Pursuant to a petition filed in 1980 by the Town of Cavendish, Vermont, the Vermont public service board, one of its three members dissenting, held that, under 30 V.S.A. § 248 (Pet. 3a), it has concurrent jurisdiction with the FERC over the project and ordered that Springfield "shall not begin site preparation for or construction of the same until it shall have obtained a certificate of public good from this Board" (Pet. 60a). The Board acknowledged that its holding is contrary to a long and unbroken line of federal and state, including Vermont, authority, headed by *First Iowa Hydro-Electric Cooperative* v. *F.P.C.*, 328 U.S. 152 (1946), but concluded that, in *California* v. *United States*, 438 U.S. 645 (1978), this Court "signaled its rejection of *First Iowa* and all of its progeny" (Pet. 63a-64a).

Thereafter, Springfield brought suit against the members of the board in the United States district court for a declaration that the board's action is incompatible with controlling federal law and illegal and void. The district court found for Springfield under the authority of *First Iowa* and declared that the order of the board exceeded its jurisdiction and is without force and effect (Pet. 8a *et seq.*, 56a, 549 F. Supp. 1134, 1157).[2]

Following argument on February 14, 1983, the court of appeals affirmed by a restricted order[3] filed on February 16, 1983 (Pet. 6a).

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[2] In two other recent cases the same court interposed the exclusivity of the FERC's jurisdiction over hydroelectric projects on navigable waters against encroachments by the Vermont public service board, *Bd. of Elec. Light Comm's of the City of Burlington* v. *McCarren*, No. 82-64 (D. Vt. Dec. 9, 1982), and the Vermont environmental board, *Town of Springfield* v. *State of Vt. Environ. Bd.*, 521 F. Supp. 243 (D. Vt. 1981).

[3] Attached to the order is the admonition:

> N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

REASONS WHY THE WRIT SHOULD BE DENIED

In kind, 30 V.S.A. § 248 and the authority of the Vermont board thereunder are indistinguishable from § 7767 of the Iowa code[4] and the authority of the Iowa executive council, held in *First Iowa* to be superseded by the Federal Power Act and the authority of the federal commission.

Neither Vermont § 248 nor, in relevant part, Iowa § 7767 is a law relating to the control, appropriation, use, or distribution of water within the meaning of § 27 of the Federal Power Act (16 U.S.C.A. § 821) or § 8 of the Reclamation Act (43 U.S.C.A. §§ 372, 383). Moreover, the provision of § 8 of the Reclamation Act applied in *California* v. *United States, supra*, which stipulates that "the Secretary of the Interior, in carrying out the provisions of [the Reclamation Act], shall proceed in conformity with such laws," has no counterpart in § 27 of the Federal Power Act.

Not only did the Court not signal "its rejection of *First Iowa* and all of its progeny" in *California*, but the two are completely harmonious.[5]

The vitality of *First Iowa* is undiminished[6] and the courts below properly concluded that it controls this case.

The authority the Vermont board exercises under 30 V.S.A. § 248, to license facilities of all kinds for the generation and transmission of electrical energy by the issuance of certificates of public good, is classically regulatory or legislative, as distinguished from judicial, in nature. Thus, the board's challenges of the jurisdiction of the district court, even if they had been addressed by the court of appeals in a manner rendering

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[4] *See* 328 U.S. at 164.

[5] In *First Iowa* the Court makes the point that § 27 of the Federal Power Act saves state water laws from supersedure. 328 U.S. at 175-76.

[6] *See New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 338 n. 6 (1982), and *Pacific Gas and Electric Co.* v. *State Energy Resources Conversation & Development Commission*, 51 U.S.L.W. 4449, 4457-58 n. 34 (1983).

them appropriate for review by this Court, would be without merit. *Bacon* v. *Rutland Railroad*, 232 U.S. 134 (1914).

The order of the board challenged below is that, regardless that Springfield obtains a license for the project from the FERC under the Federal Power Act, Springfield shall not begin site preparation or construction of the project until it shall have obtained a certificate of public good from the board pursuant to 30 V.S.A. § 248.

The federal anti-injunction statute, 28 U.S.C.A. § 2283, is without application to exercises of legislative or regulatory powers, even by state tribunals that otherwise are indisputably courts.[7] *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908), and *Roudebush* v. *Hartke*, 405 U.S. 15, 20-22 (1972).[8] The doctrine of *res judicata* has no application to determinations made in the performance of legislative or regulatory functions. *Prentis, supra*, 211 U.S. at 226-27, 230.[9] Whether the power asserted by the board, to forbid construction of the project unless licensed by it under state law, is preempted by the Federal Power Act is a question strictly of federal law, arising under an act of Congress regulating commerce, the determination of which involves no construction of state law. The jurisdiction of the district court under 28 U.S.C.A. §§ 1331 and 1337(a) is clear and there is no basis on which the court might have abstained from exercising it. *See Bacon* v. *Rutland Railroad, supra*, 232 U.S. at 138

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[7]The Vermont supreme court has repeatedly held that the board is not a court. *E.g., McFeeters* v. *Parker*, 30 A.2d 300, 303-04 (Vt. 1943). It has also held that the board is without power to enforce its own orders. *Id.*

[8]*See also Mississippi R.R. Commission* v. *Illinois Central R.R. Co.*, 203 U.S. 335, 341 (1906) (holding anti-injunction statute categorically inapplicable to actions of state administrative agencies), and *Hill* v. *Martin*, 296 U.S. 393, 397-401, (1935) (observing that anti-injunction statute would have been no bar had federal plaintiff filed suit before state proceedings had passed from administrative to judicial stage).

[9]*See also Kalb* v. *Feuerstein*, 308 U.S. 433 (1940) (holding, where the issue is preemption of state jurisdiction by federal law, the need for correct determination not only takes precedence over *res judicata* but, where preemption exists, renders state action in the area a nullity).

(holding, per Holmes, J., in case involving predecessor of Vermont public service board, that federal district court is equally available as Vermont supreme court to review action of board challenged as contrary to federal law), and *Chemical Specialties Mfrs. Ass'n, Inc.* v. *Lowery*, 452 F.2d 431, 433 (2d Cir. 1971) (holding, per Friendly, J., "abstention is peculiarly inappropriate when the federal claim is that the state has been ousted from jurisdiction").

This case does not warrant the attention of this Court because it is governed by and correctly decided under *First Iowa* and because the decision below conflicts with nothing and is represented by a restricted order of the court of appeals that cannot be availed of as precedent in any other case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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